IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

—v.—

ARABIAN AMERICAN OIL COMPANY, *et al.*,

Respondents.

ALI BOURESLAN,

Petitioner,

—v.—

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY,

Respondents.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE WOMEN'S LAW FUND, INC., THE INTERNATIONAL LABOR RIGHTS EDUCATION AND RESEARCH FUND, CAROLE D. AKGUN, AND GLORIA CONTRERAS IN SUPPORT OF PETITIONERS

Jane M. Picker
(*Counsel of Record*)
Kenneth J. Kowalski
Cleveland-Marshall College of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-3947

Isabelle Katz Pinzler
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Sidney Picker, Jr.
Case Western Reserve University Law School
11075 East Boulevard
Cleveland, Ohio 44106
(216) 268-3294

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE WOMEN'S LAW FUND, INC., THE INTERNATIONAL LABOR RIGHTS EDUCATION AND RESEARCH FUND, CAROLE D. AKGUN, AND GLORIA CONTRERAS IN SUPPORT OF PETITIONERS

The American Civil Liberties Union, the Women's Law Fund, Inc., the International Labor Rights Education and Research Fund, Carole D. Akgun, and Gloria Contreras hereby move for leave to file the annexed brief amici curiae pursuant to Rule 37.4 of the Rules of this Court. Counsel for both petitioners have consented to the filing of this brief. Counsel for respondents has refused to consent to the inclusion of Carole D. Akgun and Gloria Contreras as amici.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the preserving and enhancing the fundamental civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination in our

society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination in our society. In pursuit of that goal, the ACLU has participated in numerous discrimination cases before this Court.

The Women's Law Fund, Inc., is a nonprofit corporation with the sole purpose of "bring[ing] women into full participation in all activities of American life by securing them their full legal rights under the Constitution and laws of the United States." The Fund is particularly concerned with the problem of achieving equal employment opportunity for women and, through its funding of litigation, Women's Law Fund, Inc. seeks to assist all persons who are discriminated against because of their sex through illegal employment practices.

The International Labor Rights Education and Research Fund (ILRERF) is a nonprofit corporation organized to promote the interests of workers on an international scale to offset the effects of the global economy on worker rights. The global economy has created greater freedom for companies to relocate manu-

facturing facilities in countries without protections for working men and women resulting in a downward spiral of worker rights. The ILRERF is made up of leaders from the human rights, labor, religious and academic communities, who either on behalf of their organizations or as individuals, have an interest in working to achieve the goal of decent and humane treatment for all workers. The application of Title VII of the Civil Rights Act of 1964 to American employees of American firms operating outside of the United States is of vital concern to the ILRERF's interest in preventing situations in which American firms can avoid their legal and moral obligations to their workers by relocating to a country that does not have equivalent protection for workers.

Carole D. Akgun and Gloria Contreras are U.S. citizens and plaintiffs in Akgun v. Boeing Company, 53 E.P.D. (CCH) §40,011 (W.D. Wash. 1990). They allege that they were discriminated against on the basis of their sex when Boeing Services International, a company incorporated under the laws of the State of Delaware, terminated their employment in Turkey. Their ability to

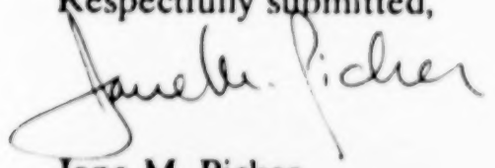
pursue their legal remedies under Title VII will be directly affected by the outcome of this case. Ms. Akgun and Ms. Contreras are not here arguing the merits of their individual claims but rather join the organizational amici herein in presenting to the Court the important questions of international law which may not be addressed by the parties or other amici.

This case involves the vitally important question of whether Title VII of the Civil Rights Act of 1964 will be construed to apply extraterritorially to the acts of American employers which discriminate against their U.S. citizen employees abroad. As more fully set forth in the Introduction to the annexed brief amici curiae, such practices effect thousands of American citizens working for American companies operating overseas. It is the primary concern of these amici to address the implication of international law principles with respect to statutory interpretation of Title VII's extraterritorial reach.

Because we believe that the decision below was erroneous, we respectfully move to leave to file the

attached brief amici curiae in order to present the Court with our views in this important case.

Respectfully submitted,



Jane M. Picker
(Counsel of Record)
Kenneth J. Kowalski
Cleveland-Marshall College
of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-3947

Sidney Picker, Jr.
Case Western Reserve
University Law School
11075 East Boulevard
Cleveland, Ohio 44106
(216) 268-3294

Isabelle Katz Pinzler
John A. Powell
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: November 14, 1990

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Publications

Miscellaneous

INTEREST OF AMICI

The interest of amici are set forth in the motion attached to this brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit, first sitting as a panel, and later, en banc, ruled that Congress did not intend Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. to protect American citizens employed by American employers overseas. Boureslan v. Aramco, 892 F.2d 1271 (5th Cir. 1990) (en banc). It is the primary concern of these amici curiae to address the implications of international law principles with respect to statutory interpretation of Title VII's extraterritorial reach. Amici herein argue that by failing to employ appropriate principles of statutory construction, including the presumption that Congress does not intend to violate international law, the ruling of the court of appeals was fundamentally flawed.

An assessment of the panel's ruling by one commentator stated:

> The decision turns on principles of statutory construction. From that perspective, it stands to reason that questions regarding the extraterritorial application of a statute -- which are, at bottom, questions regarding the relationship between the United States and other sovereign nations -- cannot be resolved without reference to jurisdictional principles of international law.[1]

The court's en banc decision no more considered jurisdictional principles of international law in interpreting congressional intent than did the panel. Applying jurisdictional principles of international law to statutory analysis can help determine whether applying Title VII of the Civil Rights Act extraterritorially would violate international law. As amici argue, the interpretation of Title VII to protect Americans employed by American employers overseas is consistent

---

[1] Gallozzi, "International Decisions," 83 Am.J. Int'l L. 375, 380 (1989) (reviewing Boureslan v. Aramco, 857 F.2d, 1014; 863 F. 2d 8 (5th Cir. 1988).

with international law's well-accepted principle of nationality jurisdiction.

However, the Fifth Circuit's en banc ruling appears to have been influenced by consideration of a far more troublesome question than the issue before it, namely, whether Title VII would then also necessarily apply to alien employers employing American citizens abroad. To apply Title VII to alien employers abroad could have been perceived to be a violation of international law at the time of Title VII's enactment.

Believing that interpreting Title VII to apply to American employers abroad would also require foreigners employing Americans overseas to be subject to Title VII, the Fifth Circuit required an express statement of congressional intent. Use of the "clearly expressed purpose" standard, enunciated earlier in Foley Bros. v. Filardo, 336 U.S. 281 (1949), is more appropriately reserved for those portions of legislation which Congress

believes are not in compliance with international law. However, the scope, object, and purpose of Title VII as well as its definitions, and §702 of the Act, which exempts aliens working abroad from Title VII's protection, constitute a clear expression from which to infer Congress' intent to apply Title VII to protect Americans employed by American employers overseas. Such application is wholly consistent with the nationality principle of prescriptive jurisdiction in international law. Whether or not Congress at a maximum also may have intended that Title VII apply to aliens is most unlikely. But the facts of this case do not raise that question.

As other briefs in support of petitioner presented to this Court will agree, court decisions, legislative history, and administrative interpretations all support the extraterritorial application of Title VII to protect Americans employed by American employers abroad. All judicial decisions prior to the court of appeals' ruling

in Boureslan had interpreted the alien exemption language of §702 to apply Title VII to American employees of American employers overseas.

The Age Discrimination in Employment Act, 29 U.S.C. §621 (hereinafter ADEA), which contained no language similar to §702 from which extraterritorial application could be inferred, was amended in 1984 to provide coverage to Americans employed by American companies overseas. Other briefs will present the legislative history of the ADEA which indicates that it was amended to bring it into conformity with Title VII's congressionally perceived extraterritorial reach.

Finally, as these amici argue, interpreting Title VII to apply extraterritorially would create no special venue or investigatory problems. Various methods of taking discovery abroad are routinely used and create no problems under international law, particularly where discovery is taken of U.S. citizens. Indeed, when

Congress amended the ADEA it did not consider it necessary to provide special venue or investigatory provisions to assist the Equal Employment Opportunity Commission (hereinafter EEOC) in its enforcement of that legislation.

ARGUMENT

Introduction

While the exact number of Americans working for American employers overseas is not known, some information is available. Over 2,000 U.S. firms operate more than 21,000 foreign subsidiaries in at least 121 foreign nations.[2] Sixty-five thousand Americans were reported to be working in Saudi Arabia in 1983.[3] And approximately 28,000 civilian Americans are employed at

[2] Street, Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad, 19 N.Y.U. J. Int'l L. & Pol. 357, 358 (1987) (citing Introduction to 1 World Trade Academy Press, Directory of American Firms Operating in Foreign Countries (10th ed. 1984)).

[3] Gerth, "2 U.S. Workers for Aramco Say Interviews Caused Their Dismissal," N.Y Times, Nov. 21, 1983, at 5, col. 3.

defense bases around the world.[4] One author has concluded: "Today, U.S. citizens abroad likely number in the millions."[5]

These numbers indicate that a significant number of Americans will be without protection if Title VII is interpreted not to apply to American employers overseas. Yet every indication suggests that discrimination is even more of a problem for Americans abroad than it is at home.

Practices described in litigation and in news reports suggest that, while discrimination in the United States may have become increasingly subtle, American employees encounter outright intentional discrimination when they work for American employers abroad. While a New York Times account of the dismissal of two

[4] Department of Defense, Worldwide Manpower Distribution by Geographic Area, June 30, 1989, at 78-82, Table P309C, U.S. Citizen Civilian Employees - Dependent Strength.

[5] Turley, "Transnational Discrimination and the Economics of Extraterritorial Regulation," 70 B.U.L. Rev. 339, 389-90 n. 289 (1990).

American Aramco employees focused on two male employees, a lawyer and a petroleum engineer, the article mentioned that the wife of one of them had also been dismissed "in the aftermath of her husband's dismissal." The article continued: "As a matter of Aramco policy, which grows out of Saudi custom, women whose husbands are no longer employed are normally forced to leave their own jobs."[6]

In class action litigation filed in Texas, it was alleged that Aramco discharged 2,200 of its overseas U.S. employees between 1984 and 1987, in violation of Title VII and the ADEA.[7] As of January 23, 1989, fifty charges of unlawful discrimination filed by Americans against their American employers abroad were pending

[6] Gerth, supra note 3.

[7] Shannor, Extraterritorial Application of Title VII of the Civil Rights Act, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (March 31, 1990). (Publication forthcoming. A tape recording of Mr. Shannor's remarks is on file with the counsel for amici, Jane M. Picker).

in the EEOC's administrative process. Of these, twenty-eight were filed in the EEOC's Houston, Texas office, most of which were charges against Aramco.[8]

Yet Aramco need not be singled out. In another case, benefits were denied American female teachers in Iran because they were considered not to "need" them; they were expected to be covered by their husbands' benefits. One of the plaintiffs, however, was divorced and therefore did not receive benefits from any source. Bryant v. International School Servs., Inc., 502 F.Supp. 472, 476 (D. N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982). In Lavrov v. NCR Corp. 600 F. Supp. 923 (S.D. Ohio 1984), the plaintiff's allegation was based upon a letter from NCR's wholly owned German subsidiary stating, "[w]ith all due respect for the equal rights principle, I do not think that any of our present vacancies would be suitable for a girl." Complaint,

[8] Id.

Attachment 2, (No. C-3-82-272).

Cases decided subsequent to the en banc ruling in Boureslan continue to show disparate treatment of American employees. In Akgun v. Boeing Company, two American female plaintiffs were terminated from their jobs by Boeing Services International (BSI) because they were considered (based upon their husbands' status) to be 'ordinarily resident' in Turkey, and therefore not entitled to the benefits of the NATO Status of Forces Agreement. The court stated that: "BSI concedes that similarly situated men, married to Turkish women, would not be considered "ordinarily resident" in Turkey and would have therefore remained members of the civilian component." 53 Emp. Prac. Dec. (CCH) ¶40,011 at 62,912 (W.D. Wash. 1990). Decisions relating to the practices of cruise liners sailing from American ports provide evidence that women are denied jobs as seamen by some employers, EEOC v. Bermuda Star Line, 744

F.Supp. 1109, (M.D. Fla. 1990), while allegations suggest that others discharge female employees when they become pregnant. EEOC v. Kloster Cruise Limited, 743 F. Supp. 856 (S.D. Fla. 1990).

With the continuing globalization of U.S. trade, American employees of American companies can expect increased travel abroad. If regulation of labor matters was once left unquestioningly to local regulation, a number of post-World War II treaties now have as their purpose the elimination of racial, religious, national origin, and gender discrimination in the workplace.[9] Such conventions attest that discriminatory practices today are a matter of worldwide rather than local concern, appropriately regulated by the international

---

[9] With respect to employment discrimination, see Convention on the Elimination of all Forms of Discrimination Against Women, opened for signature March 1, 1980, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/36 (Dec. 18, 1979), reprinted in 19 I.L.M. 33 (1980); International Convention on the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195 (Mar. 7, 1966); Convention Concerning Discrimination in Respect of Employment and Occupation, No. 111, adopted June 25, 1958, 362 U.N.T.S. 32.

community.[10] The practices of American employers overseas document violations that should not escape sanction merely because an employee's assignment is to Brussels rather than to Boston.

I. Congressional Intent Must Be Interpreted in Light of Settled Principles of International Law

The en banc opinion of the Court of Appeals for the Fifth Circuit stated that it was considering a single question: "whether Title VII regulates the employment practices of U.S. employers which employ U.S. citizens outside the United States." 892 F. 2d at 1272. Framed procedurally, the question raised was whether the court had subject matter jurisdiction of the case.

Subject matter jurisdiction is determined by an examination of congressional intent. Prescriptive jurisdiction, a doctrine of international law, determines the extent of the reach of national legislation. Congress has the power to violate international law by having its legislation reach beyond the limits specified by international law. Indeed, U.S. courts must enforce congressional statutes if they are constitutional, even though they cause the United States to be in violation of international law.[11] The fact that international law is part of U.S. law does not restrict Congress since international law (except for treaties), as part of the common law of the United States, may be modified by contrary legislation.[12] Nevertheless, a longstanding principle of construction recently reiterated by this Court

---

[10] International law is confined to matters between states, not to matters that concern only a single state. See, for example, the jurisdictional limitation of the Court of Justice to "international" law issues. Article 36-2 Statute of the International Court of Justice, 1983 U.N.Y.B. 1334 (entered into force for the U.S. on Oct 24, 1945). The sources of international law, to which the Court may refer, are found in Article 38 of the statute. Id.

[11] F.T.C. v. Compagnie de Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980).

[12] The Paquete Habana, 175 U.S. 677 (1900). The Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964), noting with approval the views of Judge Philip Jessup of the International Court of Justice, suggested that international law, together with the act of state doctrine, was a part of federal common law.

states: that "[i]t has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804), that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . .'" Weinberger v. Rossi, 456 U.S. 25, 32 (1982). This construction is justified on the ground that Congress, aware of the international law obligations of the United States, would not, without careful thought, cause the United States to violate such obligations. Hence, courts will engage in a careful consideration of congressional intent before concluding that Congress wished to violate international law.[13]

In determining whether construing Title VII of the Civil Rights Act to apply extraterritorially would violate international law, it is necessary to consider the permissible bases of prescriptive jurisdiction under

[13] See infra Section II.

international law. While there are as many as five separate bases to test the validity of a nation's legislative reach in international law, all five are basically designed to find a nexus or connection sufficient to justify application between the legislating nation and the persons or events subject to such legislation. If that nexus or connection is insufficient, the legislation is said to violate international law. Possible bases of jurisdiction will differ, depending upon whether legislation is to be applied in the United States or abroad, and whether American citizens or aliens will be governed by it.

A. International Law Is Not Violated When Title VII Is Applied To U.S. Employers Abroad

The United States historically has been "the most prolific source of extraterritorial law, regulation, and enforcement actions."[14] The post-World War II era has

[14] Small, Managing Extraterritorial Jurisdiction Problems: The United (continued...)

been characterized by increasing assertions of jurisdiction by the United States outside its borders and over aliens. While extraterritorial application of U.S. law may have become the norm in areas such as antitrust and securities law, but the exception where traditional areas of labor regulation are at stake, since the end of World War II discrimination has become recognized to be a matter of important concern throughout much of the world.

1. Territorial Jurisdiction

It is undisputed that a state has the right to legislate with respect both to persons present in its territory and to activities carried on within it.[15] Foley Brothers v. Filardo, 336 U.S. 281 (1949), is often said to have

[14] (...continued)
States Government Approach, 50 Law & Contemp. Probs. 283, 284 (1987). See also Maier, Book Review, 83 Am. J. Int'l L. 676 (1989) (reviewing The Extraterritorial Application of National Laws (Lange & Brown ed. 1987).

[15] Restatement (Third) of the Foreign Relations Law of the United States §402 (1986).

established a "rebuttable presumption that all legislation is territorial."[16] Noting that "the world's expanding workplace" has forced Congress to shift from domestic to transnational concerns, particularly in the labor area, Professor Turley has recently called for a re-examination of the presumption against extraterritoriality "in light of modern transnational conditions."[17] However, the presumption has not proved to be a barrier to extraterritorial application of U.S. laws, even to aliens, in some areas of the law. As one study noted, "[s]tates, increasingly, attach legal consequences to conduct or events outside their territory involving persons not of their own nationality. They do so, for example, under such legal constructs as 'objective territoriality' or the

[16] Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, 43 Van. L. Rev. 1103, 1144 (1990). Foley is discussed infra at Section IIA.

[17] Turley, "When in Rome: Multinational Misconduct and the Presumption Against Extraterritoriality," 84 Nw.U. L. Rev. 598, 656 (1990).

'effects doctrine,' or under such theories as 'enterprise unity.'"[18] In the antitrust area, in order to subject aliens outside the United States to U.S. law, there was a reinterpretation of the territorial basis of jurisdiction to include actions abroad having "effects" within the United States. United States v. Aluminum Co. of America, 148 F.2d. 416 (2d Cir. 1945) (hereinafter Alcoa) As the Court stated in Alcoa, "[w]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it." Id. at 443. The Alcoa court's assertion of jurisdiction was soon followed with court decisions in other areas of the law finding jurisdiction where "effects" of the activity of aliens outside the United States were felt within it." While court decisions in the United States have extended "effects" jurisdiction beyond the antitrust area, it is not a doctrine that has been developed in those areas of the

[18] Reflections on the Current State of Extraterritoriality (Nov. 2, 1984), quoted in Small, supra note 14 at 291, n.40.

law pertaining to personal rights.[19] Cases have interpreted Title VII's geographical reach from within the perspective of nationality rather than territorial jurisdiction.

2. Nationality Jurisdiction

The only issue before this Court is whether Title VII prohibits discrimination by an American employer against an American employee working outside the United States. To subject one's nationals to regulation wherever they may go is a traditional basis of jurisdiction recognized by international law and referred to as the "nationality principle" of prescriptive jurisdiction.[20] Applying Title VII exclusively to American employers

[19] See Turley, supra note 17. Professor Turley compared court decisions interpreting silent or ambiguous statutes and found such inconsistent results between antitrust and securities statutes and employment discrimination and environmental statutes that he concluded that judicial bias, due to a greater sophistication in dealing with extraterritorial market disputes, must be present, Turley, supra note 5 at 348. See also Turley, supra note 17; Note, "Constructing the State Extraterritorial: Jurisdictional Discourse, the National Interest, and Transnational Norms," 103 Harv. L. Rev. 1273 (1990).

[20] Restatement (Third) supra note 15 at §402(2).

abroad does not raise an issue of international law since the only party "affected" by the regulation is the United States.[21]

A longstanding body of decisions establishes that laws "enacted to serve important interests of government" may be applied to U.S. citizens who violate such laws while outside the United States. United States v. Layton, 855 F.2d 1388, 1395 (9th Cir. 1988), cert. denied, 109 S.Ct. 1342 (1989) (quoting Stegeman v. United States, 425 F.2d 984, 986 (9th Cir.) (en banc), cert. denied, 400 U.S. 837 (1970)). For example, the United States

[21] In international law, application of any regulation which causes harm to an individual is considered harm to the state claiming such individual as its national, thus giving such state an international cause of action against the state causing harm. That is, the state suffers injury when its national is harmed in violation of international law. Mavrommatis Palestine Concessions (Greece v. Great Britain), 1924 P.C.I.J., (ser A.) No. 2 reprinted in part in Steiner & Vagts, Transnational Legal Problems 245 (3d ed. 1986). It therefore follows that if the regulating state which purportedly harms the individual also claims that individual as its national, then that state could only have "harmed" itself. No international cause of action is possible. Indeed, one of the principal tenets of international law is that a state (with few exceptions not here relevant), as an integral part of state sovereignty, is free to do as it wishes with respect to its own nationals on the ground that such action is incapable of raising international issues.

subjects its citizens to federal income tax legislation without regard to their presence within U.S. borders. United States v. Bennett, 232 U.S. 299 (1914). United States criminal statutes, even though they may be silent as to the geographical extent of their intended application, often are interpreted to apply to U.S. citizens wherever they may be. United States v. Layton, 855 F.2d at 1395 (9th Cir. 1988)); United States v. Baker, 609 F.2d 134 (5th Cir. 1980); United States v. Zehe, 601 F. Supp. 196 (D. Mass 1985).

The United States does not exercise extraterritorial jurisdiction based upon the nationality principle to the extent that some European countries do because within the United States, state, rather than federal law, is often the basis of regulation.[22] In the post-World War II era, the antidiscrimination principle has become a corner-stone of U.S. federal policy and Congress has enacted a

[22] Restatement (Third), supra note 15 at §402, reporters' note 1.

number of antidiscrimination measures applicable to the activities of American companies abroad. For example, both the anti-boycott provisions of the Export Administration Amendments of 1977, 50 U.S.C. App. §§2401-2407 and the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§5032, 5034 and 5035 (Supp. 1989) reach U.S. companies overseas, but not their foreign counterparts.[23] Similarly, after various federal courts interpreted the ADEA as inapplicable to American employees abroad because the ADEA, otherwise similar to Title VII, had no alien exemption clause, Congress amended the Act to make clear what case law under Title VII already held: that extraterritorial coverage was

[23] The anti-boycott provisions state that the prohibitions of the Export Administration Amendments of 1977 apply to "any United States person," 50 U.S.C. §2407(a)(1) (Supp. 1990). The anti-apartheid statute's provisions concerning employment practices apply to "any national of the United States that employs more than 25 persons in South Africa," 22 U.S.C. §5034 (1990), and to labor practices of the U.S. Government, 22 U.S.C. §5032 (1990).

limited to American employers,[24] 29 U.S.C. §623(f)(1) (1984). Assertions of U.S. extraterritorial jurisdiction to prescribe the antidiscrimination laws are thus uniformly based on the nationality principle.

B. It Is Not Likely That Congress Intended Title VII To Apply To Alien Employers of Americans Abroad Since To Do So Would Have Violated Then Perceived Notions of International Law

While legislating with respect to the conduct of U.S. citizens abroad is an appropriate exercise of nationality jurisdiction,[25] enacting legislation regulating aliens outside the United States is far more controversial. As one commentator stated, "[i]f all of the defendants are American corporations, imposition of American law is

[24] As in Lavtov v. NCR, 600 F.Supp. 923, the ADEA does not apply to foreign employers operating outside the United States although the American parent may be held liable if certain control tests are met. 29 U.S.C. § 623(h) (Supp. 1989).

[25] A.V. Lowe, a British jurist, agrees: "No international problems are likely to arise as long as American laws are applied only to American nationals. . ." Lowe, "Blocking Extraterritorial Jurisdictions: The British Protection of Trading Interests Act, 1980," 75 Am. J. Int'l L. 257, 267 (1981).

less likely to offend foreign nations. It is when foreign corporations doing business with other foreign corporations find themselves subjected to United States law that the worst problems arise."[26]

1. Jurisdiction over Aliens for Acts Committed Abroad

The Fifth Circuit's decision in the instant case did not restrict itself to a determination of Congress' intent with respect to the application of Title VII to American employers, but appeared to be strongly influenced by its views on an issue not before it, nor now before this Court: the applicability of Title VII to foreign employers employing American citizens abroad.

The Boureslan majority (en banc) stated:

> Finally, if we give extraterritorial reach to Title VII, the plain language of the Act would necessarily extend that title to govern the employment relationship between foreign employers, and their American employees anywhere in the world. See [42 U.S.C.] §2000e

[26] Gann, "Foreward: Issues in Extraterritoriality," 50 Law & Contemp. Probs. 1, 18 n.38 (1987).

> (b). We say this because nothing in the Act exempts foreign employers and our courts have held that foreign employers engaged in commerce in the United States are employers under Title VII. See, e.g., Spiess v. C. Itoh & Co. (America), Inc., 643 F2d 353 (5th Cir. 1981). We doubt that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country.

892 F.2d at 1274. A consideration of the principle of prescriptive jurisdiction applicable to aliens can assist in determining the correctness of the Fifth Circuit's assumption.

Conformity with international law is not always assured when legislation regulates a foreigner committing acts abroad. Behavior such as genocide, which is everywhere condemned, may be regulated even as to aliens abroad under the universality principle of jurisdiction. Threats to internationally recognized essential national interests such as counterfeiting are subject to jurisdiction under the protective principle.

These are both well accepted principles of international law, and problems only arise with respect to their application.

Exercise of jurisdiction based on the nationality of the victim or person harmed by the conduct to be regulated is less well-accepted. This "passive personality" principle, although asserted prior to 1927 by some states, has never been explicitly accepted (or rejected) in international law.[27]

Unfortunately, the passive personality principle appears to have insinuated itself into the Fifth Circuit's en banc decision. While it might arguably justify application of Title VII to a foreign employer operating abroad, according to the Restatement:

> The passive personality principle asserts that a state may apply law -- particularly criminal law -- to an act committed outside its territory by a person not its national where the victim of the act was its national. The principle has not been generally accepted for ordinary torts or crime, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality or to assassination of a state's diplomatic representatives or other officials.

Restatement (Third) of Foreign Relations Law of the United States, §402, comment g (1986) (emphasis added).

Assertions of jurisdiction based upon the passive personality principle are far more common today than they were twenty-six years ago when Title VII first took effect. Professor Andreas F. Lowenfeld, Associate-Reporter for the Restatement (Third), has stated:

> [A]s recently as the early 1960s the Restatement (Second) of the Foreign Relations Law of the United States (1965) found it proper to state as black-letter law that: "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely

---

[27] While the extraterritorial reach of a Turkish manslaughter statute in the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 was explicitly based on the nationality of the victim (i.e., the passive personality principle), the Permanent Court of International Justice ruled in favor of Turkey on other grounds.

> on the ground that the conduct affects one of its nationals." [§30(b)] I believe that statement accurately reflected the American view of international law in 1961 and Congress respected that view.[28]

The Restatement (Second), from which Professor Lowenfeld was quoting, was circulated in draft form in the early 1960s, before its publication in 1965. Thus, when Title VII of the Civil Rights Act was under consideration by Congress, and also when it was enacted, passive personality jurisdiction was considered to be a highly questionable basis upon which to rest prescriptive jurisdiction.

2. Principles of International Law and Administrative and Court Interpretation Favor Restrictive Application of Title VII to Employers Overseas

As discussed in Point I(A)(1) supra, development of the "effects" extension of the territorial principle of prescriptive jurisdiction has not been extended beyond

---

[28] Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law," 83 Am. J. Int'l L. 880, 884 (1989).

cases in the commercial area to those involving personal rights. And many American law experts in 1964 would have considered applying Title VII to alien employers of Americans abroad under the passive personality principle to be an unwarranted exercise of jurisdiction. See Point I(B)(1) supra. Interpreting Title VII to apply to alien employers overseas therefore could contravene the presumption that Congress does not intend to violate international law. Such an interpretation of Title VII is nowhere suggested except in the Fifth Circuit's en banc opinion. This interpretation should therefore be disfavored.

Administrative agencies carefully construe statutes to be consistent with requirements of international law. No administrative or executive agency of government has construed Title VII to apply to foreign employers of American citizens overseas. In keeping with the differences in nationality jurisdiction and passive

personality jurisdiction, see Point I (B) (1) supra, the EEOC seeks to apply Title VII only to American employers employing U.S. citizens abroad as defined in its policy statement.[29]

The only court to have considered the issue has drawn the same distinction. In Lavrov v. NCR, 600 F. Supp. 923, a U.S. parent and a wholly owned German subsidiary were sued under Title VII. The trial court dismissed the subsidiary, holding that Congress could not have intended to include a foreign company operating overseas to be within Title VII's definition of "employer."

The court of appeals' assumption, therefore, cannot be correct. Principles of extraterritorial jurisdiction must be considered in determining whether Congress intended Title VII to apply exclusively to American employers

[29] EEOC Policy Statement on Application of Title VII to American Companies Overseas and to Foreign Companies, Lab. Rel. Rep. (BNA) No. 610, at 401:6063 (Sept. 2, 1988).

overseas. The court's "slippery slope"[30] reasoning ignores longstanding and uncontroversial principles of international law differentiating the type of jurisdiction required to encompass acts of a foreign employer abroad and one involving, as here, an American employer.

C. Concurrent Jurisdiction, Conflicting Regulation, and Balancing

The different bases of international jurisdiction described above may result at times in several states having prescriptive jurisdiction. While an individual may be subject to conflicting regulation if several states, each having a valid basis for prescriptive jurisdiction, simultaneously attempt to regulate the same behavior, there is no violation of international law. Rather, two or more states will have concurrent jurisdiction.[31] Thus, if

[30] See generally Schauer, "Slippery Slopes," 99 Harv. L. Rev. 361 (1985).

[31] See e.g., S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, where the Permanent Court of International Justice held that an assertion of prescriptive jurisdiction by Turkey in a ship collision case

(continued...)

an American employer is being regulated, nothing in international law prohibits applying Title VII to its alien as well as American employees (the parties protected by the regulation) under the nationality principle.[32] The same potential for conflicting concurrent jurisdictional regulation may therefore exist with respect to both alien and American employees. However, Congress explicitly determined that the United States had an insufficient social interest to warrant such concurrent jurisdictional

---

[31] (...continued)
was not otherwise precluded simply because France also had prescriptive jurisdiction. Should the regulation of activities of a national of one state, physically located in the territory of another state, be perceived by the latter to be an unwelcome interference, it can enact contrary legislation (valid under the territorial principle) to offset the perceived interference.

[32] If the United States purports to regulate the acts of foreign employers outside the U.S., then neither the territorial nor the rationality principles can be employed. If that regulation also purports to protect foreign employees, then no other principle saves it from violating international law. However, if protection is limited to American employees, such regulation may fall within the limits of international law under either the passive personality principle or the "effects" extension of the territorial principle. (This is the "slippery slope" assumption referred to by the Court of Appeals when discussing Title VII's alien exemption language. However, the facts of the instant case do not raise "slippery slope" or other issues because both employer and employee are American.)

conflict and therefore chose not to apply Title VII to alien employees abroad.[33]

No evidence of any conflict between the laws of Saudi Arabia and the United States has been presented in this case. Even if a conflict does exist, international law does not require a nation having jurisdiction to refrain from exercising it.[34] As the court stated in Laker Airlines v. Sabena, Belgian World Airlines, 731 F.2d 909, 952 (D.C. Cir. 1984), "there is no rule of international law holding that a 'more reasonable' assertion of jurisdiction mandatorily displaces a 'less

---

[33] See Title VII §702, 42 U.S.C. §2000e-1. "[T]he intent of the [alien] exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." Civil Rights Hearing on H.R. 7152 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2303 (1963) (testimony of Representative Roosevelt explaining provisions of H.R. 405, which was incorporated into Title VII of H.R. 7152).

[34] For the sources of international law where such a principle would have to be found (primarily custom, convention, or general principles) before it could restrict a state's jurisdiction, see Statute of the International Court of Justice, art. 38, 1983 U.N.Y.B. 1334 (entered into force for the U.S. on Oct. 24, 1945).

reasonable' assertion of jurisdiction as long as both are in fact consistent with the limitations on jurisdiction imposed by international law." 731 F.2d at 952. Put simply, "there is no evidence that interest balancing represents a rule of international law." Id. at 950. During the drafting of the Restatement (Third), a proposal was made to require those states having fewer interests to defer to those having greater interests when conflicts of laws develop. Nevertheless, the final draft of the Restatement used hortatory rather than mandatory language in suggesting the need to balance interests. As Professor Karl M. Meessen has stated: "A state 'should defer' but it does not have to do so."[35]

Thus, international law does not require, as suggested by Judge King in her dissent in Boureslan,[36] application of the reasonableness test of Section 403 of

---

[35] Meessen, "Conflicts of Jurisdiction Under the New Restatement," 50 Law & Contemp. Probs. 47, 62 (1967).

[36] 892 F.2d at 1281.

the Restatement (Third) to determine the legitimacy of Title VII's assertion of jurisdiction over American companies employing U.S. citizens overseas. At most, domestic, rather than international law may impose a balancing test for individual statutes. Nothing in Title VII suggests that such a test was meant to be imposed. Adoption of a balancing test could lead to the result that Title VII would be applied extraterritorially with respect to an American employer and employee in one country, while the same employer and employee might not be covered in another country.[37] Unpredictability of result then becomes the rule rather than the exception.[38]

---

[37] Compare Lauritzen v. Larsen, 345 U.S. 571 (1953), (holding that the law of a ship's flag (Denmark) rather than the Jones Act, 46 U.S.C. §688, would apply to a maritime tort claim) with Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) (holding that the Jones Act, rather than the law of the flag (Greece) applied), and Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1958) (applying the Jones Act to a domestic, but not to a foreign, shipowner).

[38] Explicit objection to the balancing approach in U.S. antitrust regulation has been made by Britain on the ground that the lack of predictability in a case-by-case approach would require individuals "to conduct their activities in accordance with American regulations

(continued...)

States may, of course, as a matter of political choice or comity,[39] choose not to exercise jurisdiction even though a legal basis of jurisdiction exists. Such exercises of comity explain many of the precedents upon which Aramco may cite in support of its position.[40]

---

[38] (...continued)
wherever there was a mere possibility that they might be found to be subject to American jurisdiction." Lowe, "Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980," 75 Am. J. Int'l L. 257, 269 (1981), and parliamentary materials cited, id. at n.58.

[39] For a discussion of comity, see Maier, "Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law," 76 Am. J. Int'l L. 280, 281-85 (1982). The Court's classic definition of the term is:

> 'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other: But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522, 543 n.27 (1987) (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)).

[40] See e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Benz v. Compania Naviera Hidalgo S.A., 353 U.S. 138 (1954); Sandberg v. McDonald, 248 U.S. 185 (1918).

II. The Fifth Circuit Required Too Explicit a Statement of Congressional Intent

The Fifth Circuit en banc majority opinion described the issue in Boureslan as "closely analogous" to the overtime compensation issue which the Supreme Court had considered in Foley Bros. Inc. v. Filardo, 336 U.S. 281, and relied upon Foley directly in ruling that Title VII was not intended to be applied abroad. However, the Foley decision is not conclusive here.

A. The Eight Hour Law At Issue In Foley Brothers v. Filardo Was Not Intended To Be Applied Abroad

The Foley Court stated that Congress' failure to distinguish citizen and alien labor abroad under the Eight Hour Law, 40 U.S.C. §324 (repealed in 1962), evidenced a lack of intent to regulate any overseas employment. 336 U.S. at 286. The Eight Hour Law, a statute first enacted in 1868, which required that working hours of employees of the U.S. government and its

contractors be restricted by contract, was never intended by Congress to apply to contracts to be performed abroad, as this Court observed in Foley. The language of the legislation, however, was general, applying to "every contract made to which the United States . . . is a party." Id at 282. In order to restrict its geographical scope, the Court applied a canon of construction: "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions." Id. at 285 (citation omitted). The Court then examined both the statute itself, legislative history, and statements from officials of various U.S. government agencies, before concluding that Congress' intention with respect to the Eight Hour Law must have been "the normal one." Id.

The government statements weighed particularly strongly in the Court's consideration. Justice Frankfurter, in a concurring opinion in which Justice Jackson joined, specifically stated that the considerations set forth in the opinion of the Comptroller General, opposing extraterritorial application, "ought properly to take precedence over the literal language of the Eight Hour Law as guides to its interpretation." Id. at 292 (Frankfurter, J., concurring). Justice Frankfurter did not consider himself bound by Vermilya-Brown v. Connell, 335 U.S. 377 (1948), decided earlier that day, only because it dealt with a question of statutory interpretation decided the same Term. In Vermilya-Brown, the Court held that the Fair Labor Standards Act of 1938, 29 U.S.C. §201 (FLSA) applied to Bermuda, an area over which the United States held a lease-hold, but did not have sovereignty. In applying the FLSA extraterritorially the Court relied on the Act's general

commerce clause language and language stating that it applied to "possessions" of the United States. Unlike the Court in Foley, the Fifth Circuit Court of Appeals, en banc, has failed to follow the position advanced by the U.S. government, favoring instead a restrictive interpretation of Title VII.

B. Foley's Determination That Labor and Industrial Relations Are Primarily of Domestic Concern Should Not Characterize the Antidiscrimination Laws Today

Statutes must be interpreted in accordance with their objects and purposes. The Fifth Circuit took the standard which it used to assess Boureslan's arguments directly from Foley: "[a]n intention to regulate labor to conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." 892 F.2d at 1273 (citations omitted) (emphasis added by the Fifth Circuit). It is apparently due to this language in Foley that labor and industrial relations became characterized

as a matter primarily of domestic concern. No language in the Eight Hour Law or in its legislative history suggested that Congress was considering application of that legislation to transnational or foreign activity. Foley, however, cannot freeze for all time this factual determination of Congress' intent in 1892 when it amended the Eight Hour Law, extending coverage of the statute to employees of government contractors. That the Eight Hour Law was deemed to have only a domestic focus at the end of the nineteenth century should not dictate conclusively the characterization of an anti-discrimination law now. By analogizing Title VII to the regulation of overtime compensation overseas, the Fifth Circuit majority trivialized the antidiscrimination laws which are a cornerstone of United States public policy today.

Unlike the situation in Foley, there had been no finding in Boureslan that the protection of American

employees from discrimination was of concern only so long as their American employers kept them within the territorial confines of the United States. While the Restatement (Third) describes industrial and labor relations as activities that are "predominantly local," it also notes assertions of U.S. jurisdiction to combat discrimination abroad. In addition to stating that "some United States civil rights legislation protects United States nationals outside the United States,"[41] the Restatement mentions assertions of U.S. jurisdiction abroad pursuant to the anti-boycott provisions of the Export Administration Amendments of 1977, 50 U.S.C. App. §2407,[42] and the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§5001, 5032, 5034 and 5035

[41] Compare Restatement (Third), §414, comment, at 271 with Restatement (Third), §721, reporters' note 13, at 243 (1986). The Restatement cites Title VII and Bryant v. International Schools Servs., Inc., 502 F.Supp. 472 (D. N.J. 1980), for the proposition that civil rights legislation of the U.S. sometimes has an extraterritorial reach.

[42] Restatement (Third), §414, reporters' note 4, at 278 (1986).

(Supp. 1989).[43] The Restatement nowhere suggests that protection of Americans from discrimination by their American employers overseas would be only a matter of "local" concern.

C. Foley's "Clearly Expressed Purpose" Standard Should Be Reserved For Legislation in Violation of International Law

The Boureslan en banc majority relied mechanically on Foley by requiring an express statement by Congress. 857 F.2d at 1278 (King, J., dissenting). It should be noted that Foley's requirement of "clearly expressed" congressional intent has not prevented courts from finding the requisite intent in language that is silent or less than clear where important matters of public policy are at stake.[44] Such a showing has generally been

[43] Restatement (Third), §414, reporters' note 10 at 282 (1986).

[44] For instance, criminal statutes "will be applied to U.S., citizens who violated its provisions while outside United States territory" when the crime is not "logically dependent on its locality but which, instead, injures the government wherever the crime occurs." United States v. Bowman, 260 U.S. 94, 97 (1922) as cited in Layton, 855 F.2d 1388. This is true even though there is no "express declaration to that (continued...)

required, and then only sometimes, when enforcement of congressional legislation would violate international law.[45]

Professor Lowenfeld has discussed Congress' recent

---

[44] (...continued)
This is true even though there is no "express declaration to that effect." Skiriotes v. Florida, 313 U.S. 69, 74 (1940). The Commodities Exchange Act, 7 U.S.C. §62, is completely silent as to jurisdiction over transactions involving "foreign commerce", yet the CEA has been applied exterritorially. Psimenos v. E.F. Hutton, 722 F2d 1041 (2d Cir. 1983). In Tamari v. Bache & Co., 730 F.2d 1103, 1108 (7th Cir. 1984), the court noted that there was no evidence of Congress' intent with regard to the extraterritorial reach of the Commodities Exchange Act. The court concluded that "[f]inding nothing in the Act or its legislative history to indicate that Congress did not intend the CEA to apply to foreign agents, but recognizing that there also is no direct evidence that Congress intended such application, we believe it is appropriate to rely on the 'conduct' and 'effects' tests in discerning whether subject matter jurisdiction exists over this dispute." Id. at 1107. See also Steele v. Bulova Watch Co., 344 U.S. 280, 286-87 (1952) (construing the Lanham Act).

[45] Indeed, authority is unclear as to exactly what showing of Congressional intent must be made before legislation will be interpreted to violate international law. In Rossi, 456 U.S. at 32 (1982), "some affirmative expression of congressional intent" was needed "to abrogate the United States international obligation." On the other hand, in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979), the Court stated that "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights." According to Professor Steinhardt, "[n]o other court, however, similarly has a required statutory provision to identify and expressly override a particular treaty or customary norm." Steinhardt, supra note 16, at 1166-67 n.275.

exercise of jurisdiction in enacting certain statutes criminalizing terrorist behavior occurring outside the United States, statutes in which extraterritorial jurisdiction (justifiable only by the passive personality principle) was expressly noted. The express statement of such expanded claims of jurisdiction was necessary, Professor Lowenfeld stated, since courts might otherwise have considered the assertion of such jurisdiction to be contrary to international law and would therefore have construed the statutes not to have been intended to apply outside United States territory.[46] Indeed, even after Congress amended the Destruction of Aircraft or Aircraft Facilities Act, 18 U.S.C. §32(a), in 1984 to apply within a "special [extraterritorial] aircraft jurisdiction of the United States," judicial concerns were voiced regarding such jurisdiction. Thus, in United States v. Yunis, 681 F.Supp. 896 (D.D.C. 1988), the court referred

---

[46] Lowenfeld, supra note 28.

to the passive personality theory of jurisdiction as an "anathema to United States lawmakers." Id. at 902.

D. Interpreting Title VII to Apply to U.S. Employers Employing Americans Abroad Involves No Violation of International Law, and Congressional Intent Need Not Be Explicitly Stated

The American view of jurisdictional principles of international law at the time of Title VII's enactment in 1964 suggests that it could have viewed the application of Title VII to foreign employers abroad to be a violation of international law. The presumption that Congress does not intend to violate international law, however, should preclude such an interpretation without an explicit statement by Congress. Interpreting Title VII as applicable merely to U.S. employers should require no clearer showing of Congressional intent than can be devised through the usual methods of statutory interpretation.

Like the Fair Labor Standards Act, interpreted in

Vermilya-Brown, supra, as extraterritorially applicable and unlike Foley where the Court rejected extraterritorial application of the Eight Hour Law, Title VII expressly refers to commerce "among the several States; or between a State and any place outside thereof." 42 U.S. §2000(e)(g) (emphasis added). Other briefs submitted to this Court argue that Title VII's language and the legislative history of §702's alien exemption provision indicate that Title VII's language, at a minimum indicates Congress' clear awareness of foreign consequences. The Eight Hour Law interpreted in Foley, by contrast, fails even to hint that Congress was contemplating any international or transnational activity.

As other briefs argue, cases decided prior to the Boureslan court's en banc decision uniformly found jurisdiction over Title VII claims brought by employees of U.S. companies doing business overseas. A clear indication of Congressional intent is also evident from

the legislative history of the ADEA and its 1984 amendment. And the use of alien exemption language in Title VII pertaining to federal employees supports the same conclusion.

The U.S. government, as evidenced by the EEOC Policy statement,[47] supports the extraterritorial application of Title VII. Interpreting Title VII to apply only to U.S. employers abroad cannot violate international law. Unlike the court in Foley, which gave great weight to the government's position,[48] the Fifth Circuit Court of Appeals failed to follow the position advanced by the government, favoring instead a restrictive interpretation. The en banc decision is particularly surprising because the reason for following the government's position in matters relating to foreign relations is compelling. It is sometimes said that in the

---

[47] See note 29 supra.

[48] See Section II (A) supra.

States, through all its branches, judicial as well as executive, "speak with one voice."[49]

III. No Special Venue or EEOC Investigatory Problems Arise in Applying Title VII Extraterritorially to American Employers

That Title VII makes no special provisions for venue and EEOC investigative power with respect to exercising jurisdiction abroad was one reason cited by the majority in Boureslan for its holding. 892 F.2d at 1274. However, Title VII provides a choice of venue. As Judge King reminded in her dissent:

> First, Title VII provides for venue not only in the district in which the violation was committed, but also in either the district where relevant employment records are administered, or the district where the aggrieved employee would have worked but for the unlawful employment practice . . . or in the

---

[49] Steinhardt, supra note 16. Professor Steinhardt further stated: "Under the one voice maxim, the courts will not presume to revisit political decisions taken by the executive branch or articulate principles of international law that might place the United States in breach of its international obligations or embarrass the conduct of this diplomacy." Id. at 1132.

> have worked but for the unlawful employment practice . . . or in the judicial district in which the respondent has his principal office.

892 F.2d at 1280 (citing 42 U.S.C. §2000e-(f)(3)). Contrary to the majority's reasoning, no special venue problems are created through applying Title VII extraterritorially. Moreover, Aramco has not challenged this Court's venue.

There are many routes which parties to litigation before United States courts can take to secure needed evidence located abroad. Rule 4(i) of the Federal Rules of Civil Procedure provides for service of process overseas. In keeping with international law's acceptance of jurisdiction based on nationality, distinctions are drawn between discovery from U.S. nationals and discovery from aliens. That Congress has the power to legislate with respect to its citizens who are in foreign countries has been clear at least since Blackmer v. United States, 284 U.S. 421, 437 (1932). In Blackmer,

the Court upheld the Act of July 3, 1926, 28 U.S.C. §§711-718, which permits a court of the United States to issue a subpoena requiring "a national or resident of the United States who is in a foreign country" to appear before the court, or to produce documents or other things, if to do so is "in the interest of justice" and the document or other thing, or the testimony in admissible form, cannot be obtained in any other manner.

Treaties to which the United States is a party also contemplate foreign discovery. Article 8 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361; T.I.A.S. 6638; 658 U.N.T.S. 163 (1969), permits any Contracting State to refuse direct service of judicial documents through diplomatic or consular agents, "unless the document is to be served upon a national of the State in which the documents originate."

When the ADEA was amended in 1984 to provide

extraterritorial coverage, no special provision regarding venue was enacted, nor was overseas investigatory power provided to the EEOC. If, as the Boureslan majority contends, specific provisions are necessary for the overseas application of Title VII, the failure to do so would doom congressional intent. However, no court has questioned the ADEA's extraterritorial application since its amendment in 1984. Surprisingly, in view of this history, Aramco points to the ADEA as an example or clear expression of congressional intent. Obviously, the presence or absence of a special venue provision has no bearing on the jurisdictional question.

The Boureslan court also considered the limitation on the EEOC's jnvestigatory powers to indicate that Congress intended a similar limit on the statute's jurisdiction. However, the EEOC has been held to have investigatory powers abroad even where it does not have

jurisdiction to prosecute a charge.[50] In attempting to buttress its conclusion, the Boureslan court magnified the importance of this restriction. While in some cases, without special venue, investigation by the EEOC might be more difficult, Title VII also provides that a private plaintiff may bring suit and enforce rights guaranteed by Title VII without completion of an EEOC investigation.[51]

The Boureslan majority decision ignores the many existing procedures which permit service of process and the taking of discovery overseas. This is particularly simplified when, as here, all parties to the litigation are U.S. citizens, rendering unnecessary special venue or EEOC investigative provisions.

---

[50] EEOC v. Institute of Gas Technology, 24 Empl. Prac. Dec. (CCH) 31,198 (N.D. Ill. 1980). See also Street, "International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices," 31 How. L.J. 497, 518-19, n.82 (1988), and cases cited therein.

[51] § 706(f)(1).

CONCLUSION

Based upon his nationality, the petitioner in this case is subject to many U.S. laws when he is employed outside the United States. To conclude that Congress intended him to bear the burdens of U.S. laws without the benefits of Title VII's protection, leaving him vulnerable to illegal discrimination by his American employer merely because of his assignment overseas, is to impute to Congress an intent which no evidence supports.

The language, purpose and legislative history of Title VII, and the vital importance of civil rights to Americans everywhere, all indicate that Congress intended that the protections and remedies of Title VII be available to American employees of U.S. employers abroad. The exercise of extraterritorial jurisdiction under Title VII is compatible with principles of international law and requires no clearer expression of Congressional intent than §702 of the statute already provides. For these

reasons, the decision below should be reversed.

Respectfully submitted,

Jane M. Picker
(Counsel of Record)
Kenneth J. Kowalski
Cleveland-Marshall College
of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-3947

Sidney Picker, Jr.
Case Western Reserve
University Law School
11075 East Boulevard
Cleveland, Ohio 44106
(216) 268-3294

Isabelle Katz Pinzler
John A. Powell
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: November 15, 1990